IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CONNER RUBIN, LLC, a Washington limited liability company, Respondent, v. BIG CONSTRUCTION, INC., a Washington corporation; Appellant, PLATTE RIVER INSURANCE CO., a Wisconsin corporation & Contractor's Bond No. 41079329, Defendant.	)	No. 64294-4-I DIVISION ONE UNPUBLISHED OPINION FILED: July 19, 2010

Becker, J. – Big Construction, Inc., did construction work under contract for Conner Rubin, LLC. After disputes arose about billing and payments, the parties met and signed a new agreement. Conner Rubin performed as specified in the agreement. Big, however, filed a $353,137.44 lien against Conner Rubin's property. Conner Rubin filed a breach of contract claim against Big; Big counterclaimed seeking to foreclose on its lien. On summary judgment, the trial

court dismissed Big's counterclaims and required Big to remove the lien and pay Conner Rubin's attorney fees and costs incurred in opposing the lien. Big appeals, but fails to demonstrate a genuine issue of material fact. Accordingly, we affirm the summary judgment in favor of Conner Rubin.

This court conducts the same inquiry as the trial court in reviewing a summary judgment order, reviewing the order de novo and viewing all evidence in the light most favorable to the nonmoving party. RAP 9.12; Young v. Key Pharm., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989); Pac. Nw. Group A v. Pizza Blends, Inc., 90 Wn. App. 273, 280-82, 951 P.2d 826 (1998).

Construction Contract

On March 14, 2007, Conner Rubin and Big entered into a construction contract for the remodel of Rubin's restaurant and cardroom. This contract established a contract price of approximately $450,000 and a payment schedule. The contract also expressly required an eight-week completion deadline, as Conner Rubin was concerned about losing its gambling license if the restaurant was closed for a longer period of time. Big agreed to pay liquidated damages of $500 per day of delay.

Construction Costs, Billing, and Payment

Conner Rubin paid the first $150,000 as specified in the contract. Thereafter, the parties varied from the terms of the initial contract. On March 29, they agreed to a change order authorizing additional expenses based on latent problems with footing and foundation, and the need for new flooring. On August

1, Big submitted an invoice, reciting a $110,000 charge. Conner Rubin disagreed with the charge and paid only $70,000. With Big's September 24 invoice, further complications arose. The invoice recited $82,464.44 in new charges and a remaining balance of $60,000 owed by Conner Rubin. Conner Rubin objected to the billing but, eager to avoid further delay, paid Big $30,000 on September 28.

October 4 Agreement and Lien Releases

On October 4, the parties had a meeting to discuss and resolve the issues surrounding the construction and the billing. At the meeting were Danny Rubin, a principal of Conner Rubin, Rick Mouw, Conner Rubin's property manager, and Danny Kim, Big's president. The meeting resulted in an agreement signed by Conner Rubin and Big and two lien releases signed by Big.

The agreement stated that "Big Construction agrees that the balance owed to complete construction . . . is $96,000." The agreement recited several specific items to be completed, and provided that extra electrical floor outlets and parking lot lights were not included in the agreement. Conner Rubin was required to pay Big $68,000 on October 4, with a final payment of $28,000 due when the final occupancy permit was issued. The estimated completion date was October 15.

The first lien release, titled "Conditional Release," covered "all mechanic's liens, stop notice, equitable lien and labor and material rights" against Conner Rubin's property "regarding labor services, materials purchased, rented,

acquired

or furnished for use and used on" the project. The release was effective upon payment of $68,000. It is undisputed that Conner Rubin paid Big $68,000 that same day.

The second lien release, titled "Full Release," covered "all mechanic's liens, stop notice, equitable lien and labor and material bond rights" for "all materials, supplies, labor, services, etc., purchased, acquired or furnished by or for use and used on" the property. The Full Release stated that Big "has been paid in FULL for all labor, subcontract work, equipment and materials supplied" to the project up to November 4, 2007, in the amount of $510,000.

Performance Under the October 4 Agreement

On October 4, after the agreement and the releases were signed, Conner Rubin paid Big $68,000. On October 22, Big requested an advance on the remaining $28,000 owed under the contract to pay workers. Conner Rubin paid $20,000. On November 19, Conner Rubin paid the last installment of $8,000 under the agreement, and an additional $7,000 for the floor outlets referenced in the agreement.

Procedural History

Notwithstanding the October 4 agreement and lien releases, on February 27, 2008, Big filed a claim of lien against Conner Rubin's restaurant in the amount of $353,137.44. Conner Rubin filed a breach of contract claim in the King County Superior Court, alleging the lien was frivolous. Big answered and filed a counterclaim seeking to foreclose on the lien. Conner Rubin answered

the counterclaim. There followed a period of discovery.

In a deposition, Big's president Kim claimed he believed he was due more than the $96,000 recited in the October 4 agreement, but signed because he needed the money to pay his workers. He claimed he told Danny Rubin that the amount recited in the contract was not, in his view, the correct amount owed to Big. Nonetheless, he agreed to take the money and signed the agreement. Kim admitted he was paid the amounts recited in the agreement and that Conner Rubin performed its obligations under the agreement. He also claimed that after he signed the agreement, Danny Rubin promised him he would hire Big on additional projects. Kim also admitted that on October 4, he already knew about all of the work items he eventually completed on the project—that is, no new work on the restaurant property came to light after he signed the agreement.

Conner Rubin moved for summary dismissal of Big's counterclaim, and Big moved for summary judgment in its favor on its lien claim. The trial court granted Conner Rubin's motion and ordered, in relevant part, that: (1) Big's counterclaims were dismissed with prejudice, (2) Conner Rubin was entitled to attorney fees and necessary expenses in fighting the lien claim, and (3) Conner Rubin's remaining breach of contract claims were dismissed. Big's motion for reconsideration was denied.

BIG'S CLAIMS

Threshold Issues

Big raises two threshold issues on appeal. Big first asserts that Conner

Rubin should not have been permitted to introduce evidence of the October 4 agreement because their initial complaint did not specifically "plead enforcement of the settlement agreement." We decline to apply Big's overly technical approach to evaluating Conner Rubin's pleadings. The pleadings adequately referenced the agreement in numerous places, and a copy of the agreement was attached to the complaint as an appendix. Conner Rubin's pleading was sufficient to alert Big of the relevance of the agreement to the issue of the propriety of Big's lien. Washington follows notice pleading rules and simply requires a "'concise statement of the claim and the relief sought.'" Champagne v. Thurston County, 163 Wn.2d 69, 84, 178 P.3d 936 (2008), quoting Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 352, 144 P.3d 276 (2006). Parties use the discovery process to uncover the evidence necessary to pursue their claims and defenses. Putman v. Wenatchee Valley Med. Ctr, P.S., 166 Wn.2d 974, 983, 216 P.3d 374 (2009). Big cites no authority in support of its position. There was no error.

Big next asserts this court should deem all assertions in Big's counterclaim as admitted by Conner Rubin, even though it is undisputed that Conner Rubin answered Big's counterclaim before the summary judgment hearing and denied the relevant assertions. Big's claim is unpersuasive. Rubin did, in fact, file an answer to the counterclaim in its responsive pleading. That is all CR 8(d) requires.[1] Big cites no authority for its urged interpretation. Again,

[1] CR 8(d) provides:
Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, *are admitted when not*

there was no error.

No Genuine Issues of Material Fact

The central issue on appeal is Big's claim that there were issues of material fact requiring resolution at trial. The essence of Big's claims is that the October 4 agreement was subsequently modified by Conner Rubin's alleged promise to hire Big for future construction projects, that Kim believed this promise was part of the agreement, that Conner Rubin failed to perform these new promised obligations under the agreement, and that the agreement was not based on adequate consideration. We conclude the evidentiary record, even when viewed in the light most favorable to Big, does not demonstrate a triable issue regarding Big's claims.

We will affirm a summary judgment when there is no genuine issue about any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc., 120 Wn.2d 573, 580, 844 P.2d 428 (1993). If the party moving for summary judgment meets its initial burden of showing there is no dispute as to any material fact, the burden shifts to the nonmoving party. Pac. Nw. Group A, 90 Wn. App. at 280-82. To survive summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. CR 56(e); Pac. Nw. Group A, 90 Wn. App. at 280-82. In making this responsive showing, the nonmoving party

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> *denied in the responsive pleading*. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(Emphasis added).

cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The touchstone of the interpretation of contracts is the intent of the parties. Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). The intent of the parties to a particular agreement may be determined from the language of the agreement, the contract as a whole, the subject matter and objective of the contract, the circumstances surrounding the making of the contract, the subsequent conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. Berg, 115 Wn.2d at 667.

Conner Rubin met its initial burden of demonstrating no triable issue regarding the validity of the lien, even when the evidence is viewed in the light most favorable to Big. The declarations of Danny Rubin and Rick Mouw explaining the construction process, Big's billing, and Conner Rubin's payment history are particularly pertinent. The only reasonable inferences to be drawn from their declarations are that as construction progressed, the parties convened to discuss the status of the construction project, that the parties both had reasons for entering into the October 4 agreement as it was written, that Conner Rubin performed its obligations under the agreement, and that Big's subsequent lien was invalid as a result. Thus, Conner Rubin met its initial burden.

Big was then required to demonstrate a factual issue remained for trial.

Although Big argues that there were four separate factual issues requiring trial, it fails to set forth specific facts which, when viewed in the light most favorable to Big, demonstrate any issue as to any material fact.

First, Big claims a factual dispute existed as to whether the October 4 agreement was subsequently modified. The existence or nonexistence of an oral agreement is normally considered an issue of fact requiring trial. See, e.g., Pac. Nw. Group A, 90 Wn. App. at 280-82. However, this is so only when a party can identify specific evidence indicating such an oral agreement occurred. In the record designated for this court, the only evidence even tangentially related to this argument is Kim's deposition testimony that sometime after the October 4 agreement was signed, Danny Rubin promised he would hire Big on unspecified future project contracts. This evidence does not demonstrate that Big would have agreed to do such future work for Conner Rubin or that there was any consideration discussed.

The evidence also does not allow any inference that this alleged promise influenced Kim's understanding of either parties' obligations under the written agreement, either at the time it was entered or subsequently. Kim's lone remark, even considered in context with the rest of the evidence and viewed in the light most favorable to Big, does not support any inference that Danny Rubin's alleged promise pertained in any way to the October 4 agreement. Absent such a nexus, Kim's remark fails to raise a genuine factual issue as to whether the October 4 agreement was ever subsequently modified.

Second, Big asserts Conner Rubin refused to honor its alleged verbal contract and that this demonstrates there was never a meeting of the minds about the amount to be paid under the agreement, citing Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 30, 111 P.3d 1192 (2005), review denied, 156 Wn.2d 1030 (2006). However, the evidence, including Kim's deposition testimony, indicates that Kim knew how much money he was receiving under the agreement and chose to accept it, regardless of the amount he felt he was owed at the time. Although Big argues that Kim stated he expected to receive an additional $150,000, this claim is not supported by evidence in the appellate record. And Kim's testimony regarding the alleged promise of future work, at best, demonstrates Big would be awarded two future project contracts. Again, this evidence shows no nexus between Kim's belief he was promised future work and the terms of the October 4 agreement, and does not support a reasonable inference that there was one.

The evidence, even viewed in the light most favorable to Big, does not raise a genuine factual issue as to whether there was an absence of a meeting of minds or a "merger of oral and written terms" of the agreement, as Big argues. Flower does not compel a contrary result. In Flower, the appellant won reversal of a summary judgment order by successfully presenting evidence supporting an inference that an earlier written employment agreement containing an at-will employment term was merged with a subsequent oral agreement eliminating the at-will term. 127 Wn. App. at 30. In Flower, the record sufficiently demonstrated

a clear nexus between the first agreement and the second agreement, and the terms of both. Here, by contrast, the evidence supports no inference that such a nexus existed.

Third, Big claims that a factual dispute existed as to whether Conner Rubin fully performed under the agreement. There is no evidence supporting any reasonable inference that Conner Rubin did not perform as promised under the agreement. Conner Rubin promptly paid Big the initial $68,000 promised and paid the remainder of the promised $96,000 in a timely fashion. Kim's deposition testimony explicitly confirmed that Conner Rubin performed as promised in the agreement. The evidence, even when viewed in a light most favorable to Big, fails to show a factual issue relating to Conner Rubin's performance under the October 4 Agreement.

Fourth, Big claims a factual issue existed as to whether there was an absence of new consideration to support the October 4 agreement, citing Rosellini v. Banchero, 83 Wn.2d 268, 273, 517 P.2d 955 (1974). Rosellini sets forth the rule that a modification or subsequent agreement is not supported by consideration if one party promises to perform some additional obligation while the other party promises simply to perform that which he promised in the original contract. 83 Wn.2d at 273. But that is not the case here.

The evidence, particularly the written agreement, only supports the conclusion that both parties undertook additional obligations. It is undisputed that Big received the additional promised payments of $68,000 and $28,000.

Furthermore, Conner Rubin's assent to the delayed completion date effectively waived the liquidated damages clause of the initial construction contract, under which Big was required to complete the construction within eight weeks or face a $500 per day penalty.

The facts of this case are unlike the facts at issue in Rosellini, where our Supreme Court held a modification to a construction contract was not supported by new consideration. In Rosellini, there was no specified completion date in the original contract and the Court found the subsequent agreement did not amount to an extension of the completion date. By contrast, Big and Conner Rubin expressly agreed upon a completion time of eight weeks from the date of the March 14 contract, approximately May 9. The October 4 agreement specified a new, later estimated completion date of October 15, 2007. Therefore, the extension amounted to new consideration. See Rosellini, 83 Wn.2d at 274. By extending the deadline, Conner Rubin abandoned a potential claim of $87,000 against Big, based on a calculation of a 174 day delay.

Here, the record, even viewed in the light most favorable to Big, only supports the conclusion that there was adequate consideration underlying the agreement. Rosellini, 83 Wn.2d at 274. There is no genuine issue of material fact.

NO SANCTIONS/ATTORNEY FEES

Conner Rubin urges that this court sanction Big under RAP 18.9(a) and award Conner Rubin its attorney fees on appeal.[2] We conclude Big's appeal

[2] RAP 18.9(a) provides in pertinent part:

was not frivolous or filed solely for purposes of delay and did not fail to comply with the rules in a manner which makes such sanctions or fees appropriate. See Skinner v. Holgate, 141 Wn. App. 840, 173 P.3d 300 (2007). We decline to impose such terms or damages.

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

CONCLUSION

We affirm the trial court's order granting summary dismissal of Big's counterclaim and awarding Conner Rubin its attorney fees and costs incurred in opposing the lien.

Becker, J.

WE CONCUR:

Dwyer, C.J.

Cox, J.